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History and Organization of Notaries in Ontario

Prepared by
Nina R. Schloesser
for
The Professional Organizations Committee

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The Professional Organizations Committee,
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HISTORY AND ORGANIZATION
OF NOTARIES IN ONTARIO

An Internal Working Document
prepared by

Nina R. Schloesser

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PART I: GENERAL HISTORY

Go with me to a notary; seal me there your single
bond.

[Merchant of Venice, i.3.]

Away with him, I say; hang him with his pen and
inkhorn [badge of medieval notaries] about his neck.

[Henry VI, pt. 2.]

The above lines attest to the existence of notaries public in Shakespearean times. In fact authorities believe that the office of notary public originated in ancient Rome.¹ Roman officials known as "scribes" (scribae) performed duties similar to present day notaries public. Some scribes dealt with public matters, such as the recording of state documents or other public proceedings. Others acted for private individuals, drafting such documents as wills, deeds and conveyances. The word "notary" (notarius) derived from a system of shorthand invented in the last century of the Republic. The title of notarius was eventually given only to high government officials.

Private documents could be drawn up by the "scribes" who would seal them with the official court seal, thereby giving them the authenticity of public acts. Usually, however, private documents were drawn up by private professional scribes (tabellones).² Documents drawn by tabellones were binding on the parties concerned, but could not be accepted as proof or otherwise given the same respect as public documents. Accordingly, documents drawn up by tabellones were often registered in the public archives, which gave them the status of public documents.

The office of notary continued to exist after the fall of the Roman Empire. Although the Teutonic count replaced the Roman governor of the court, many of the Roman customs remained the same. Most courts

attached registrars or "Notaries of the Court" to their courts. Notaries of the court (almost always ecclesiastics) functioned as had the Roman scribes. Notaries (Palatine notaries) were also attached to the appeal tribunal (curia regis). In the 9th century, Charlegmagne appointed special justices (missi regii) to hold assizes four times a year in different parts of his domain. Notaries (royal notaries) were selected to accompany the special justices. The distinction between the three classes of notaries disappeared by the 12th century. The Count Palatine retained the right to appoint notaries, and granted that right to other officers of state or municipalities to grant commissions as well. The 12th century also marked the point at which the Pope began to appoint papal notaries for extra-territorial purposes.

Gradually all notarial documents were granted the status of public instruments. Further, documents drawn up and attested to by a notary public began to have executory force. Thus, judgement could be enforced on a document without bringing an action.

In England, both civil and ecclesiastical notaries were present from or before the time of the Norman conquest.³ They did not, however, possess as much authority as continental notaries.⁴ Civil and ecclesiastical notaries were generally of (or associated with) the clergy. Gradually, laymen began to assume some of the functions of notaries public. In London and surrounding environs, notaries, as members of the Company of Scriveners, had a monopoly on the preparation of all documents, from the reign of Edward II until 1760 (the time at which solicitors were given the right to practice conveyancing).

No changes were brought about by the Reformation except that the power of the Pope to grant commissions was transferred to the King

by 25 Henry VII, c. 21. The current legislation applicable to notaries public was enacted in the 19th century.⁵ Canadian notaries assumed the powers of the English notary in the 19th century. Gradually (as will presently be shown), they took on the more restricted role of present day notaries public.

PART II: THE LEGISLATION

History of the Ontario Act

Legislation governing notaries public was first enacted in 1869.⁶ Subsequent amendments were made in 1877, 1887, 1897, and 1909.⁷ Major changes were made by the new Notaries Act of 1962.⁸ Despite amendments enacted in 1964 and 1970, the present Act differs little from the Act of 1962.

Pursuant to the 1869 Act, notarial appointments were made at the discretion of the Lieutenant-Governor. Notaries public were granted powers of:

... drawing, passing, keeping, and issuing all deeds, contracts, charter parties, and other merchantile transactions in the Province, and attesting to commercial instruments. 10

Amendments passed in 1877 provided for examinations of the prospective application by a county court judge or appointee of the Lieutenant-Governor, and gave the Lieutenant-Governor power to make regulations for the examination of notaries public.¹¹ The examination was required for all non-lawyer applicants. Two criteria determined the outcome of the examination: whether the applicant was "qualified" for the office, and whether there was a "need" for his services in the community.

The examiner's decision as to what constituted "need" and "qualifications" was completely discretionary. The same procedure for examination exists today.

Powers of, and sanctions against, commissioners for taking affidavits were granted by the 1887 amendments to the Act.¹²

Commissioners' powers were set out in section 4:

... [to] take and receive all such affidavits and affirmations ... concerning any of the proceedings in the High Court or Court of Appeal.¹³

One of the sanctions for misconduct as a commissioner was revocation of the commission.¹⁴

There is some question as to whether a de facto citizenship requirement was instituted by section 5 of the 1887 amendment. In section 5, the notary was made "officer of the court".¹⁵ Confusion surrounds the question of whether an "officer of the court" must be a Canadian citizen,¹⁶ and this confusion may have created a departmental bias against the admission of aliens. However, there was no specific citizenship requirement between 1887 and 1962, and non-Canadians may have been granted notarial patents.

The powers of notaries public were significantly affected by the amendments of 1909.¹⁷ No changes were made in the original section granting notarial powers. However, a new section was added whereby restrictions of "territory and case" could be imposed on non-lawyer notaries. The notary could thus be required to use his/her seal only on certain kinds of documents, for a specified firm and within a delineated territory. A sample limitation of the notarial commission in Ontario is as follows:

"... to _____ in and for the province of Ontario (or judicial district of _____), limited to the attestation of instruments and the taking of affidavits only, while in the employ of _____."

The Notaries Act, 1962

Important changes in the legislation were made by The Notaries Act of 1962, S.O. 1962, c. 91. Bill 63 (An Act to amend the Notaries Act) was introduced by Attorney General Cass on February 26, 1963.

The Honourable Mr. Cass explained the introduction of the Bill on the grounds that it was intended to result in better regulation of the "non-lawyer notary". Better regulation was to be accomplished by allowing the commission to expire every three years with provision for re-examination and renewal. The re-examination would determine whether the notaries were "keeping up with the change of laws and carrying out their duties adequately".¹⁸

Some discussion of the benefits of a discretionary examination procedure took place at the second reading.¹⁹ Mr. Cass was asked by a member whether a list of objective criteria for admission could be compiled and circulated to prospective applicants. Mr. Cass offered to examine the proposal. It does not appear that the proposal was examined or adopted.²⁰

The Act, when passed, contained several changes. Notarial appointments were made at the recommendation of the Attorney General.²¹ Canadian citizenship was made an explicit requirement.²²

Provision was made for the triennial expiry and renewal of the non-legal notaries' commissions. The notary was required to write the expiry date of the commission next to his signature and the seal. A later amendment required the seal to contain the expiry date.

Certain sanctions were added for misuse of powers granted in the Act by notaries public.²³ Misuse of powers granted in the Act consists of either unauthorized practice of law or other acts not permitted by section 3.²⁴

According to the case of R. ex. rel. Smith v. Mitchell, 1952 O.R. 896 (C.A.), unauthorized practice of law may arise in many circumstances. With respect to notaries, it consists mainly in the giving of advice as to legal requirements in the completion of documents.²⁵

Provision is also made for the prosecution of persons unlawfully acting or holding themselves out as notaries.²⁶ The sanctions for both offenses consist of fines or, for the public notary, possible revocation of the notarial commission.

No major changes have been made since the enactment of the 1962 legislation.

The Act authorizes the exercise of powers of the commission "under The Commissioner's Act". Some discussion of The Commissioners for Taking Affidavits Act, R.S.O. 1970, c. 72, is necessary to describe the functions of a commissioner.

Under The Commissioner's Act, commissioners are given the power to "take any affidavit with respect to any matter determined before an Ontario court", or for any Act requiring an affidavit. Commissioners are given commissions for three-year renewable periods.²⁷ Commissions may be revoked on evidence of improper behaviour.²⁸ A number of government officials are made commissioners ex officio.²⁹

The question of whether restrictions imposed on a notary apply when he/she acts as a commissioner merits discussion.³⁰ The Notaries Act restricts only acts of the notary per se. Thus, when the notary acts as commissioner, he/she may not be required to act within a certain area or while in the employ of a particular firm. At the same time, it is arguable that the notary acting as commissioner remains a notary, and that notarial restrictions do apply.³¹

Legislation in other Provinces

Legislation regulating notaries public exists in every province. The Quebec Act need not be discussed here, for notarial powers in a civil law system provide little insight for a common law province such as Ontario.³² While statutory provision for appointment of lay notaries exists in every province, there is evidence that the legislation may rarely, if at all, be used.³³ For example, there is a New Brunswick Notaries Act which provides for the appointment of lay notaries. The Act is never used, however, for ministerial policy precludes the appointment of non-lawyer notaries.³⁴ The following is purely a statutory analysis, and may not reflect the dichotomy between what is allowed and what actually occurs.

With the exception of British Columbia, little dramatic variation between the provinces exists in legislation concerned with notaries public. Legislation, for the most part, does not extensively relate the acts of notaries.³⁵

In nearly all of the provinces, notaries are granted commissions under the auspices of the Attorney General,³⁶ the Lieutenant-General,³⁷ or the Attorney General subject to the approval of the Lieutenant-Governor or a delegate.³⁸ Conduct is regulated in those provinces by the ministry which controls the appointment process. Only in British Columbia do notaries belong to a self-regulatory society. Despite the existence of a notaries' society, notaries are still appointed by a Supreme Court Judge.

Notaries in British Columbia and Ontario, once appointed, have certain protections under the respective Acts. A person who does not hold a notarial patent who "acts as" or "holds himself/herself out" as

a notary public is subject to prosecution. "Holding out" may be given a wide or narrow construction. Widely, it means to "act as" a notary public. Narrowly, it means to represent by word, print, or deed that one is a notary public. The narrow construction of "holding out" is the most viable with respect to the Ontario Act. Provision is already made for prosecution of persons "acting as" notaries public, and it seems likely that the provision preventing "holding out" was added to cover representation, as well as act. The other provinces do not provide for this form of protection in their Acts.

Statutory authority derives from a specific act in six of the provinces.³⁹ Two provinces have legislation for notaries within a general act.⁴⁰ Notaries in British Columbia are regulated pursuant to The Notaries Act and The Societies Act.

Regulations in three provinces may be made by the Lieutenant-Governor or the Attorney General.⁴¹ Regulations in all provinces have the purpose of implementing sections of the Act. British Columbia is the only province giving notaries powers to regulate themselves.

In six provinces, an applicant must be a British or Canadian citizen to qualify for admission. British Columbia is the only province to require residency. Four provinces dictate an examination of the non-legal applicant as to his/her "qualifications" for the job, and the "need" of the area for a notary public.

There is some variance between provinces as to possible disciplinary measures. Discipline is explicitly provided for in only three of the provinces.⁴² Provision is made for a disciplinary committee enquiry and revocation by the society directors in British Columbia. In Newfoundland, the Lieutenant-Governor, on recommendation

CHART "A"

LEGISLATION FOR NOTARIES PUBLIC
IN DIFFERENT JURISDICTIONS

CANADA

<p>ALBERTA <u>The Public Notaries Act</u>, R.S.A. 1970, c. 261; as am. S.A. c. 82, S.A. 1977, c. 55.</p>	<p>Exclusive Practice Reserve of Title</p>	<p>Composition of Government Body</p>	<p>Authority</p>	<p>Rule-making Power Approval Regulations Made Subject Matter</p>
<p>BRITISH COLUMBIA <u>The Notaries Act</u>. R.S.B.C. 1960, c. 266; am. 1967 c. 31, 1968, c. 53, 1969 c. 35. <u>The Societies Act</u>, R.S.B.C. 1960 c. 362; as am.</p>				
<p>MANITOBA <u>The Manitoba Evidence Act</u>, R.S.M. 1970 Cap. E. 150; as am. 1970 c. 96 1971 c. 70, 1972 c. 81; 1974 c. 59 1976 c. 69, 1977, c. 57.</p>	<p>No provision</p>	<p>No provision s. 76: Appointed by the Lieutenant- Governor in Council</p>	<p>General Statutory authority</p>	<p>No provision</p>
<p>NEW BRUNSWICK <u>An Act Respecting Notaries</u>, R.S.N.B. 1973, N-9.</p>	<p>No provision</p>	<p>3.1: Appointed by the Lieutenant- Governor in Council</p>	<p>Special Statutory authority</p>	<p>s. 3: Lieutenant-Governor makes regulations for exam- ination of notary pblics.</p>

	<p>Exclusive Practice Reserve of Title</p>	<p>Composition of Government Body</p>	<p>Authority</p>	<p>Rule-making Power Approval Regulations Made Subject Matter</p>
<p>NEWFOUNDLAND <u>The Notaries Public Act</u>, R.S.N. 1970, c. 275; as am. S.N. 1973 No. 48, s. 4(w)</p>	<p>No provision</p>	<p>No provision s. 2: appointed by Lieutenant-Governor on recommendation of the Ministry of Justice</p>	<p>Special Statutory authority</p>	<p>No provision</p>
<p>NOVA SCOTIA <u>Notaries and Commissioners Act</u>, R.S.N.S. 1967, c. 208</p>	<p>No provision</p>	<p>No provision Governor in Council may appoint such persons as he thinks fit to be notary publics</p>	<p>Special Statutory authority</p>	<p>No provision</p>
<p>PRINCE EDWARD ISLAND <u>Law Society and Legal Profession Act</u>, R.S.P.E.I. 1974, c. L-9, as am. 1975, c. 51, Part III</p>	<p>No provision</p>	<p>No provision s. 42 Lieutenant-Governor in Council may appoint during pleasure, Notary publics in P.E.I.</p>	<p>General Statutory authority</p>	<p>No provision</p>
<p>SASKATCHEWAN <u>The Notaries Public Act</u>, R.S.S. 1972, c. 84.</p>	<p>No provision</p>	<p>No provision s. 2: Attorney-General may appoint Canadian citizens as notary publics.</p>	<p>Special Statutory authority</p>	<p>No provision</p>
<p>ONTARIO <u>The Notaries Public Act</u>, R.S.O. 1970, c. 300</p>	<p>s. 6: Every person who carries on business as a notary public or who holds himself out as such, or who not being otherwise authorized by law, performs any function of a notary public without a commission is guilty of an offense.</p>	<p>Notary publics s.7 appointed by Lieutenant-Governor subject to recommendation of Attorney-General.</p>	<p>Special Statutory authority</p>	<p>No provision s. 8: Lieutenant-Governor may make regulations. fees- for appointment and exam; and for carrying out Act.</p>

	Education Requirements	Noneducational-Good moral character-age-citizenship transfer requirements	Appeal Examination Hearing Rights	Advertisements	Re-examination
ALBERTA	No provision	s. 2(2) British or Canadian citizen s. 2: appointed by the Attorney-General residing in Alberta	No provision	No provision	s. 6: 2 year commission, then renewal
BRITISH COLUMBIA	Letter from Secretary of Notaries Public of B.C. (18th October 1978): Notaries appt. under s. 9 of Act, with "full" powers, undergo exam equivalent to second year law student. Examination committee chaired by Law professor; notaries appt. under s. 21, with 'restricted powers are not examined.	s. 6: Must be British subject. Resided in B.C. for 3 years prior to application Bylaws of Society of Notaries Public of B.C. (1976): Code of Ethics	s. 6: Application made to court, court satisfies itself as to "need" and "qualification" and then gives examination. s. 8: Court may appoint 3 persons to examine.	Bylaws, Code of Ethics, s. 1.09: No advertising (except professional cards).	s. 5 annual re-certification.
MANITOBA	No provision	s. 76: British subject	No provision	No provision	s. 78(1): Commission remains in force if person is lawyer; s. 78(3) otherwise, every 2 years.
NEW BRUNSWICK	No provision	No provision	s. 2: Non-lawyer subject to examination by Ministry of Justice as to "need" and "qualification"	No provision	No provision

	Education Requirements	Noneducational-Good moral character-age-citizenship transfer requirements	Appeal Examination Hearing Rights	Advertisements	Re-examination
NEWFOUNDLAND	No provision	s. 2(1): British citizenship	No provision	No provision	No provision
NOVA SCOTIA	No provision	No provision	No provision	No provision	No provision
PRINCE EDWARD ISLAND	No provision	No provision	No provision	No provision	No provision
SASKATCHEWAN	No provision	s. 2: Canadian or British subject	No provision	No provision	s. 5: Non-lawyers every 5 years
ONTARIO	No provision	s. 2: Canadian citizen	No provision	No provision	s. 5(1): three years for non-lawyers

	Disciplinary Body and Powers	Procedure	Rulings Grounds - Details as to Proof	Powers
ALBERTA	No provision	No provision	No provision	4(1): a. administration of oaths and affidavits affirmations and declarations; b. draw, pass, keep and issue, deeds and contracts c. attest to all commercial instruments d. exercise all other powers that pertain to notary publics
BRITISH COLUMBIA	s. 10 Court may enquire as to notary publics conduct; s. 26 directors appoint disciplinary committees(not less than 3 members); s. 18 appeal to the court of appeal for any provision of this act.	s. 22 special fund for reimbursement of persons who have sustained dollar loss from notary public. S. 27 disciplinary committee may inquire into conduct of members	s. 28: 1. misappropriation or wrongful conversion... 2. other professional misconduct 3. conduct unbecoming 4. breach of Act's provisions.	15 a. draw, pass upon, keep and issue deeds, contracts, charter parties, and other merchantile instruments within the province. b. draw and supervise the execution of wills of the class prescribed by the laws of the notary publics society. c. attest to or protest all commercial instruments brought before him for commercial protestation d. administer oaths, affidavits, affirmations or statutory declarations that may be or are required to be administered, sworn, affirmed, or made by the law of the Province of ... e. perform such duties as may be authorized or perscribed by the Act or other legislation.
MANITOBA	No provision	No provision	No provision	s. 81: every notary public has, and may use and exercise the power of administering oaths attested by his signature and seal, the attesting of commercial instruments brought before him ... and the giving of the notarial certificate his acts, and may demand, receive ...
NEW BRUNSWICK	No provision	No provision	No provision	s. 4 A notary public has the power of drawing, passing, keeping and issuing all deeds, contracts, charter parties and other merchantile transactions ... and also attesting all commercial instruments brought before him ... and may otherwise act as authorized by the province in the office of notary.

	Disciplinary Body and Powers	Procedure	Rulings Grounds - Details as to Proof	Powers
NEWFOUNDLAND	Lieutenant-Governor may revoke s. 5.	No provision	No provision	s. 6: Subject of the Law Society Act a notary public has and may use and exercise the power to attest any document brought before him and otherwise to act as authorized by any statute.
NOVA SCOTIA	No provision	No provision	No provision	s. 2: "drawing, passing, keeping and issuing all deeds and contracts, charter-parties, and other merchantile transactions in this province; and also of attesting all commercial instruments brought before him for public protestations, and otherwise of acting as usual in the office of notary publics.
PRINCE EDWARD ISLAND	No provision	No provision	No provision	No provision
SASKATCHEWAN	No provision	No provision	No provision	s. 3: "... drawing, passing, keeping and issuing all deeds and contracts, charter parties, and other merchantile documents in Saskatchewan; and also of attesting all commercial instruments that may be brought before him for public protestation, and otherwise acting as usual in the office of notary publics.
ONTARIO	s. 7(2). The Lieutenant-Governor may revoke the commission of a notary public	No provision	s. 7(2) conduct in violation of act ...	s. 3: drawing, passing, keeping and issuing all deeds and contracts, charter-parties and other merchantile transactions in Ontario, and also of attesting all commercial instruments that may be brought before him for public protestation, and otherwise of acting as usual in the office of notary ...

	Restrictions on Notary	Powers of a Commissioner	Special Provisions	Numbers of Lay Notaries
ALBERTA	s. 4(2) may be restricted to: a. administration of oaths/affdavits b. attesting to commercial documents c. issuing certification	No provisions	No provisions	14 lay notaries appointed without restriction under s. 4 of Act. 377 lay notaries appointed with restrictions under s. 4(2) of Act.
BRITISH COLUMBIA	s. 7 Court may restrict power of notary public Two classes of notaries: those appointed under s. 21 with restrictions, and those appointed under s. 9, with fewer restrictions. Restrictions for latter group are set out in s. 15.	No provisions	No provisions	Not available
MANITOBA	No provisions	s. 90: plus powers of commissioner	s. 83: expiration date must be stamped	150 (approx.) lay notaries apted. 1200 (approx) lawyer notaries appointed. No difference in powers of commission except for duration.
NEW BRUNSWICK	No provisions	No provisions	No provisions	No appointments made under <u>Notaries Act</u> of lay notaries.

	Restrictions on Notary	Powers of a Commissioner	Special Provisions	Numbers of Lay Notaries
NEWFOUNDLAND	No provisions	No provisions	No provisions	Not available
NOVA SCOTIA	No provisions	No provisions	No provisions	only 1 lay notary appointed under Act.
PRINCE EDWARD ISLAND	No provisions	No provisions	No provisions	Not available
SASKATCHEWAN	No provisions	No provisions	s. 6(1) Expiration date must be stamped	1250 (approx.) non-lawyer notaries appointed. 650 (approx.) lawyer notaries appointed. No difference in powers of commission except for duration.
ONTARIO	s. 2(2) where a person other than a barrister and solicitor, is appointed a notary public, restrictions may be imposed in the commission limiting the territory and cases in which such a person may exercise his powers.	s. 4(1) yes	s. 6: notary acting beyond powers is penalized	Approximately 650 lay notaries appointed under Act.

of the Minister of Justice, may revoke the commission.⁴³ The Ontario Act also provides for revocation of the commission. No procedural guidelines appear in either the Ontario or Newfoundland Acts.

The Newfoundland Act does not set out any grounds for discipline. In Ontario, the notary may be disciplined for "any violation of the act".⁴⁴ British Columbia disciplines notaries for "misappropriation, conduct unbecoming a notary", and other "professional misconduct".⁴⁵

Non-lawyer notaries must review their commissions in a majority of the provinces every two to five years.⁴⁶

Powers granted to notaries are largely the same across Canada. The notary public is granted the power to attest commercial instruments, administer oaths, and exercise all other powers consistent with the notarial commission (except in Manitoba and New Brunswick). In British Columbia, notaries are given the power to draw and supervise the execution of wills.⁴⁷ Only in Ontario and Manitoba are the powers of a commissioner specifically granted.⁴⁸ The Acts in the other provinces could be construed as granting certain powers of commissioners. However, no powers are explicitly granted (except two above mentioned). Restrictions of territory and case are placed on notaries public in two other provinces besides Ontario.⁴⁹

The Acts in British Columbia and Ontario dictate greater regulation of the notarial conduct than legislation in other provinces. Little is done to regulate the conduct in the remaining provinces other than by the renewal process.

The British Columbia legislation authorizes the continued existence of a notaries society.⁵⁰ Regulation of the member is accomplished by a variety of legislative devices. The society is empowered to make

regulations on all matters. Not only is there a committee to discipline members, but a special fund has been established to compensate innocent third parties harmed by a member's misconduct.⁵¹ Another layer of control is established by the appointment process through the courts and appointed examiners.⁵² Society by-laws (as opposed to regulations) are subject to the approval of the Attorney General and the Benchers of the Law Society. In a sense, British Columbia's society is not completely self-regulated as the authority for the appointment process is external to the society.

Ontario's statute, save for the lack of provision for a regulatory "society", places comparable importance on the regulation of notaries' functions. The same provision as in British Columbia is made for an appointment process, complete with examination as to prospective notaries' qualifications. As noted before, revocation is an available method of discipline. No particular procedure for discipline is set out in the statute. Grounds for discipline are more explicitly set out in British Columbia than in Ontario. Correspondingly, the discretion of the responsible ministry as to what constitutes misconduct is enlarged.

As noted before, notaries in Ontario, British Columbia (and Alberta) may be restricted as to how, where, and for whom they may practise. British Columbia and Ontario are the only two provinces to explicitly give notaries public the protection of exclusive right to practise.

Ontario's legislation is nearly as comprehensive as that of British Columbia. The only true difference between the two is that British Columbia provides for a fairly complex system of discipline

and a self-regulatory society. More provision for discipline means more regulation as long as there is consensus as to what constitutes good or bad behaviour. Some argument may be made that as long as criteria for admission, powers and restrictions remain vague, then consensus as to what merits discipline will be impossible. There is doubt as to whether the former kind of consensus exists in Ontario.

The United States

A representative sample of fifteen states was surveyed (see Chart B). Most of the legislation was comparable to that in Canada. As in Ontario, notaries have a clerical rather than an advisory function.⁵³ A majority of the states require a minimum age for application.⁵⁴ Until recently, citizenship was another requirement for the notarial commission. This requirement was called into question by two recent decisions of the federal district court of appeal⁵⁵ which held that the requirement had nothing to do with any possible valid state objective, and was therefore a violation of the equal protection clause of the Fourteenth Amendment.

Only three of the states surveyed require "good moral character" on the part of the applicant.⁵⁶ No guidelines as to educational qualifications for becoming a notary public are set out in the legislation, with the exception of one state. Wisconsin has the vague requirement of an eighth grade education or equivalent.

Generally, notaries public are appointed by the secretary of state,⁵⁷ or the governor⁵⁸ according to the "need" of the district for a notary. As in Canada, the decision as to whom to appoint is largely discretionary.⁵⁹ The appointment process is purely of statutory

CHART "B"

LEGISLATION FOR NOTARIES PUBLIC
IN DIFFERENT JURISDICTIONS

USA

CHART "B" - U.S.A.

CHART "B" - U.S.A.	Exclusive Practice Reserve of Title	Self-regulated If so: what rule making power?	Educational requirements and Non Educational Requirements such as Age, Citizenship Good moral Character, etc.	Appeal from Admission
California <u>Notaries Public Act</u> <u>R.S. Government</u> s.8201	8227.1: Yes reserve of title. To "represent" oneself as	Not self-regulated 8200: Secretary of State appoints notaries public as he deems necessary	Educational requirements: satisfactory completion of written exam on laws of state Non-educational requirements: Age: 8201, 18 years of age Citizenship: 8201: legal resident. Good moral character: 8201.1, yes.	8214.3: "hearing on matter
Colorado <u>Notaries Public Act</u> C.R.S. 12-55-110	No provision	Not self-regulated 55-110: appointed by Secretary of State	No provision	No provision
Delaware D.R.S. v 19 4301	No provision	Not self-regulated 4301: appointed by Governor or other state officials	No provision Non educational requirements Age: 4301(b) 18 years of age Citizenship: 4301(b)1: legal resident Good moral character: 4301(b)1 yes.	No provision
Florida F.S.A. 117.01	No provision	Not self-regulated: 117.01. Governor may appoint as many notaries as he deems necessary	Educational requirements: No provision Non-educational requirements: 117.01, Age: 18 years of age	No provision
Hawaii H.R.S. 1976 456-1	456-7: Yes Exclusive practice	Not self-regulated: 456-1: Attorney General may appoint and commission notary publics 456-8: Attorney General may make rules or regulations	Educational requirements: no provision Non-educational requirements Age: 456.2, 18 years of age Citizenship: 456.2, resident of state. Other: 456.2, other qualifications for officers of state	No provision

Iowa I.C.A. 77.1	Exclusive Practice Reserve of Title	Self-regulated If so: what rule making power?	Educational Requirements and Non Educational Requirements such as Age, Citizenship Good Moral Character, etc.	Appeal from Admission
	No provision	Not self-regulated 77.1 Secretary of State may appoint one or more notaries	No provision	No provision
Illinois IRS c. 99 1	18.1: Exclusive practice	Not self-regulated 1: appointed by Secretary of State, "as he deems necessary"	Educational requirements: No provision Non-educational requirements: Age: 1, 18 years of age Citizenship: 1, Citizen of United States and 90 day resident	No provision
Maine M.R.S.A. 4 951 M. Consti: Art V, p.I, 8	No provision	Not self-regulated Const. s.8: appointed by Governor (upon advice of council)	No provision	No provision
Massachusetts M. const: s 105, s 139, MSC: s 222.1 MSC: s268.33	168.33, reserve of title, 267.1: exclusive practice	Not self-regulated 106: appointed by Governor	No provision	No provision
Missouri V.A.M.S. s. 486.200	375. exclusive practice	Not self-regulated 205. appointed by Secretary of State	Educational requirements: No provision Non-educational requirements: 220:(1), (2), (3), Age: 18 years of age. Citizenship: US citizen, registered voter, resident. Other (5), (6), reads and writes English, no revoca- tion in past 5 years.	No provision

Exclusive Practice Reserve of Title	Self-regulated If so: what rule making power?	Educational Requirements and Non Educational Requirements such as Age, Citizenship Good Moral Character, etc.	Appeal from Admission
Nebraska Neb. R.R.S. c. 64.101	No provision	Educational requirements: No provision Non-educational requirements: 101.1, Age: 19, Other: 101, need petition of 25 voters	No provision
Oklahoma 47 OKl. St. Ann S49.1	No provision	Educational requirements: No provision Non-educational requirements: 1. 18 years or older 1. US citizen and Oklahoma resident	No provision
Texas T.R.S. 5949	No provision	Educational requirements: No provision Non-educational requirements: 1(2): 18 years of age, U.S. citizen and Texas resident	1(2) right of appeal from refusal to admit
Wisconsin WSA 137.07	No provision	Educational requirements: 1(1)b: 8th grade education or equivalent Non-educational requirements: 1(1)18 years of age. 1(1) Wisconsin resident 1(1)b: good moral character required	No provision

	Disciplinary Procedure	Renewal	Appointed as Commissioners for Taking Affidavits as well?	Requirement of Bond
California	Discipline: Yes, s.8214.1: grounds s.8214.3: hearing required see: 1500 for procedure "administrative adjudication	8209: 4 year commission	Not explicitly granted See: 8204-powers of notaries public	8212: Yes, \$10,000
Colorado	No provision	101: 4 year appointment	No provision	106: Yes, \$1,000.
Delaware	4301: Governor may revoke commission for any just cause	4306: first time 2 year term, after 2 year term may request reappoint- ment for 4 year term	No provision	No provision
Florida	117.69: punishment for fraudulent conduct	117.03: 4 Year commission	No provision	117.04(4) Yes, \$100,000
Hawaii	No provision	456(1) 4 year commission	No provision	456-5: Yes \$1500/\$500

	Disciplinary Procedure	Renewal	Appointed as Commissioners for Taking Affidavits as well?	Requirement of Bond
Iowa	77.1 Secretary of State can revoke	77.2: 3 year Commission	No provision	77.4(2) yes \$500
Illinois	18. Secretary of State may apply for injunction notice for misconduct	3. 4 year commission	No provision	4. yes \$1,000
Maine	95.5: Secretary of State may remove notary public from office	No provision	No provision	No provision
Massachusetts	139: Governor may remove notaries public from office with consent of committee	106: 7 year commission	No provision	No provision
Missouri	355: liable in damages for official misconduct 315: must comply with notice of revocation 370: fine for either knowingly or negligently causing harm See B(2) for grounds	101: 4 year term	No provision	102: yes, \$10,000

	Disciplinary Procedure	Renewal	Appointed as Commissioners for Taking Affidavits as well?	Requirement of Bond
Nebraska	109: liable for misconduct 113: misconduct: disinterested person appointed by Governor has notaries public appear before him, takes testimony	101: 4 year term	No provision	235: Yes \$4,000
Oklahoma	No provision	1. 4 year term	No provision	2. Yes \$1,000
Texas	1(3) right of appeal for any disciplinary procedure	1(a) 2 year term	No provision	1(3) Yes \$2,500.
Wisconsin	(8) duty owed to those injured by misconduct	(1)(f) 4 year commission	No provision	1(1)d Yes \$500

	Examination Requirement	Powers/Restrictions
California	8201(c) : yes	<p>(1) To demand acceptance and payment of foreign and inland bills of exchange</p> <p>(2) To take acknowledgement of proof of power of attorney.</p> <p>(3) To take depositions and affidavit and administer oaths and affirmations in all matters incident to the duties of the office or to be used before any court, judge, officer, or board.</p>
Colorado	No provision	<p>55.102: Power to take and authenticate acknowledgements to any instrument, to administer any oath or affirmation, to take any deposition, to make any declaration or protest</p> <p>55.105: Seal must indicate expiration of commission.</p>
Delaware	No provision	Powers belongong to office ...
Florida	No provision	119.01: Must put down expiration date.
Hawaii	No provision	<p>456.10: Duty to record losses ...</p> <p>465.11: Protests, negotiable papers.</p> <p>456.13: May administer oaths.</p> <p>456.14: Not connected with corporation or trust company.</p>

	Examination Requirement	Powers/Restrictions
Iowa	No provision	97.7: Each Notary Public is invested with powers of a Notary Public.
Illinois	No provision	10: May execute duties throughout state.
Maine	No provision	Notary Public powers derived from two acts.
Massachusetts	No provision	222.1: Notaries public have jurisdiction throughout Commonwealth.
Missouri	No provision	250: Notary public may: <ul style="list-style-type: none"> (1) Take acknowledgements (2) Administer oaths and affidavits (3) Certify that a copy of a document is a true copy of another document. (4) Perform any other act permitted by law. 275: Notary Public must put expiration date and county where commissioned. 210: Notary Public may perform acts anywhere in state.

	Examination Requirement	Powers/Restrictions
Nebraska	101: Must certify to Government under oath that he/she understands laws relating to Notaries Public	107: (1) Administer oaths and affidavits. (2) Take depositions. (3) Demand acceptance or payment of any foreign inland domestic bill of exchange, etc. (4) To exercise powers and duties by law of Nations and accommodate to common usage.
Oklahoma	No provisions	6: Notaries public shall have authority within any county of state to make the proof and acknowledgement of deed and other instruments in writing required to proved or otherwise to administer oaths, to demand acceptance or payment of foreign or inland bills of exchange and promissory notes and protest the same for non-payment.
Texas	No provisions	Appointment limited to one county. 1(a)2: Acknowledgement of proofs or of written instruments, permitted by law to be protested. Administration of oaths, and taking of depositions.
Wisconsin	No provisions	1(1)e: Jurisdiction of entire state (may practice anywhere). To demand acceptance of foreign and inland bills of exchange and payment of promissory notes, protest the same for acceptance or nonpayment, may administer oaths and perform other duties as by law of nations or according to common usage, may be exercised and performed by Notaries public. (1)-(2): Automatic appointment for lawyers.

origin. The prospective applicant has no rights or requirements outside of the legislation. Only Texas provides for a right of appeal for the rejected applicant.⁶⁰

Six of the states protect the notary public through the device of exclusive practice or reserve of title.⁶¹ Sanctions exist to punish misconduct on a notary's part as well. Many states require that the notary public post a bond with sureties for carrying out his/her duties.⁶² The notary will not be called upon to fulfill the obligation on the bond if he/she fulfills his/her duties diligently. If the notary acts wrongly, the person harmed by the notary's misconduct or negligence is the beneficiary of the bond.⁶³ The notary is, in all states, subject to civil liability for acts of negligence or other misconduct while acting in an official capacity. Fulfillment of the obligation on the bond will often be sufficient discharge of liability. Many of the states have provision for revocation of the notarial commission. Of the states examined, only Missouri and California provided for a complete disciplinary procedure.⁶⁴

Notaries in the United States are basically granted the same powers as Canadian notaries. They consist mostly of attesting and certifying to:

... certain documents, in order to give them credit and authenticity in foreign jurisdictions, to take acknowledgements of and certify deeds and other conveyances ... and to perform certain official acts, chiefly in commercial matters.⁶⁵

Perhaps the most unusual and progressive statutory provision for notaries public exists in California. California, unlike British Columbia, does not provide for a self-regulatory society of notaries public.

However, it remains of interest, if only for its unique⁶⁶ system of appointment. California is the only state to set out objective criteria for qualifying as a notary public. The notary must:

...have satisfactorily completed a written exam ... prescribed by the Secretary of State to determine the fitness of the person to exercise the functions of a notary public ... All questions shall be based on the law of this state as set forth in the booklet of the laws of California relating to notaries public distributed by the Secretary of State ...⁶⁷

Not only are there objective criteria for "qualification" as a notary public, but the objective criteria are also circulated.⁶⁸ Discretion as to appointments is retained by the criterion that the Secretary of State be satisfied that there is "need" for a notary in the particular area, and by the requirement that the notary possess "honesty, credibility, and truthfulness".⁶⁹

Provision is made for refusal, revocation or suspension of the commission for a number of acts termed as misconduct, from the use of misleading advertisement to unauthorized practice of law.⁷⁰

The "practice of law" is defined in the recent California Court of Appeal decision of Vanderhoof v. Prudential Savings and Loan Association,⁷¹ as:

...the volunteering of information with respect to the legal effect of the manner in which a document is executed⁷²

The legislation also provides for the fact that there might be an innocent misunderstanding about the role of notaries on the part of recent immigrants to the United States. It is required that any non-lawyer notary who advertises services in languages other than English post a sign stating both that the person is not an attorney, and the fees charged for notarial services.⁷³ Notaries public who hold themselves out as "immigration specialists" may not advertise that they

are notaries public at all.⁷⁴ Performance of the latter offense may result in disciplinary proceedings.

The progressivism of the California legislation is twofold. First, the applicant for the notarial commission is not subjected to a possibly arbitrary admission process. Thus, a focus on the rights of prospective notaries public is included in the statute. Second, the innocent third party is protected by provision for prosecution and punishment which could prevent excursions into unauthorized spheres. The legislation is responsive to both the interests of the notary public and the interests of innocent third parties.

Legislation in England

Few changes have been made in the English legislation regarding notaries public which was enacted in the 19th century. The Public Notaries Act 1801, (41 Geo. 3 c. 79), provides for appointment of general notaries public by the Court of Faculties after an apprenticeship of 7 years (reduced to 5 years by The Public Notaries Act 1843, s. 3). Pursuant to the Act of 1801, General Notaries may practise nearly anywhere in England and Wales.⁷⁵ The area of London and immediate surroundings, however, is under the jurisdiction of the Company of Scriveners. A notary must join the Company of Scriveners in order to use his commission in the London area.⁷⁶ The Public Notaries Act of 1833 (3 & 4 Will. 4, c. 70), provides for the appointment of solicitors as district notaries, to practise in a specified territory outside of London. No apprenticeship is necessary to become a district notary.

The Public Notaries Act of 1843 (6 & 7 Vict. c. 90), grants the right of appeal for an unjust refusal of admission.⁷⁷ Provision is also

made for prosecution of unauthorized practice as a notary.⁷⁸

Duties commonly thought of as "notarial" in Canada are not regulated by statute in England.⁷⁹ Duties broader than those granted in Canada are provided for by The Solicitor's Act, 1974 c. 47, sections 22-23. The non-solicitor notary may draft real and personal estate documents, and documents for any other legal procedure:

22. (1) Subject to subsection (2), any unqualified person who directly or indirectly -

- (a) draws or prepares any instrument of transfer or charge for the purposes of the Land Registration Act 1925, or makes any application or lodges any document for registration under that Act as the registry, or
- (b) draws or prepares any other instrument relating to real or personal estate, or any legal proceeding,

shall, unless he proves that the act was not done for or in expectation of any fee, gain or reward, be guilty of an offence and liable on summary conviction to a fine not exceeding £ 50.

(2) Subsection (1) does not apply to-

- (a) a barrister or duly certificated notary public;

23. (1) If any person to whom this subsection applies, directly or as an agent of any other person, whether or not that other person is a person to whom this subsection applies -

- (a) takes instructions for a grant of probate or of letters of administration, or
- (b) draws or prepares any papers on which to found or oppose any such grant,

he shall, unless he proves that the act was not done for or in expectation of any fee, gain or reward, and without prejudice to any other liability or disability to which he may be subject under this or any other Act, be guilty of an offence and liable on summary conviction to a fine not exceeding £10.

(2) Subsection (1) applies to any unqualified person who is not a barrister or duly certificated notary public.

The court of faculties may strike a notary's name from the roll of notaries upon evidence of misconduct.⁸⁰

Despite that fact that there is provision for appointment of non-solicitor notaries with wide powers in England; it is likely that the power of appointment is not abused. The requirement of five years of apprenticeship with a reputable notary⁸¹ before admission to the roll of notaries public probably precludes most misuse of the commission.

PART III: SUMMARY OF DISCRETIONARY PROCEDURES UNDER THE ONTARIO ACT

A. Appointment*

Enquiries often come through lawyers, on behalf of clients. The provincial examiner indicates that the notarial patent is not a licence and is not granted automatically. He asks the applicant to write on paper with the firm's letterhead, explaining "need", and what transactions are made out of province and country. Often, an appointment as a commissioner is sufficient.

The provincial examiner looks at the letter and decides whether to reject outright or send an application form. An application form may then be sent. Appended to it is a note requesting particulars of "need".

After the application form is returned, an examination takes place. The examiner is either a county court judge or the provincial examiner. The examination is first concerned with "need". The examiner asks why the appointment is needed, and expects a complete explanation.^{**}

* all material for this section comes from interviews with Mr. Peter Clendenning, provincial examiner (21 June 1978), and Mr. Ron Schurman, provincial examiner 1973-1977 (26 June 1978).

** The applicants' firm/business must have been in existence for at least 6 months.

He then examines the applicant's personal qualifications. The examiner ascertains whether the person understands the notarial duties, and whether he/she has a rudimentary understanding of the legal problems which might arise. He repeats questions already asked for in the correspondence, to test the applicant's verbal skills. If the candidate fulfills all criteria, the provincial examiner explains the limitations of the appointment. The certificate is prepared by the Ministry of Government Services, recorded at the Government Services Protocol Office, and sent to the notary. Note that the above procedure may vary slightly when undertaken by a county court judge.

It should be mentioned that the appointment process is completely discretionary, and an application may be refused despite proper qualification and need. The provincial examiner has made few new appointments during 1977-1978.

B. Complaints and Discipline

For the most part complaints are received through correspondence. Over 50% of complaints are referred from the Law Society. Nearly all complaints fall into two categories: queries as to what a notary may do with a restricted patent, and questions about the meaning of the restriction as to use of the notarial seal only while in the employ of a specific firm.

The investigatory procedure is informal. Generally, the problem is handled by correspondence and discussions over the telephone. The provincial examiner's office is small, and does not have the capacity for full-scale investigations of complaints.

If there is evidence of misuse, several disciplinary alternatives are available. The new provincial examiner has not revoked any commissions during his term in office (June, 1977 - June, 1978). In all cases meriting discipline, a reprimand has been sufficient. Because of certain ambiguities in the Act, the notary is often confused about limitations placed on his/her commission. Once informed by the reprimand, the notaries (since the time the new provincial examiner was appointed) have thus far ceased the questionable practice immediately.

PART IV: DATA SECTION

A. Descriptive Outline of Lay Notaries

A survey was conducted of 197 lay notaries' files.⁸² The sample constitutes approximately one year of notarial appointments or renewals.⁸³ Each file was examined for 17 different criteria.⁸⁴ However, not all files contained complete information. The results are as follows:

All age groups are represented in the sample. Few notaries (1%) are younger than 25 years of age. The largest percentile group (20%) is that of notaries 60 years or older.

TABLE I: Age of Notaries

	No.	%
20-25	2	1
25-30	4	2
30-35	11	6
35-40	21	11
40-45	34	17
45-50	25	13
50-55	31	16
55-60	29	15
60+	40	20

N = 197

Most notaries are male (92%).

TABLE II: Sex of Notaries

	No.	%
Male	182	92
Female	15	8

Notaries come from a number of different birthplaces. However, a majority of the notaries (51-52%) were born in Ontario or elsewhere in Canada.

TABLE III: Birthplace

	No.	%		No.	%
Ontario	2	1	Czechoslovakia	5	3
Canada	88	51	France	1	1
U.K.	14	8	Russia	2	1
Italy	26	15	Switzerland	1	1
Hungary	7	4	China	1	1
Poland	2	1	Turkey	1	1
Germany	5	3	The Netherlands	1	1
Portugal	3	2	Malta	1	1
Estonia	2	1	Greece	2	1
Yugoslavia	4	2	Guyana	1	1
Australia	1	1	Ukraine	1	1
Latvia	2	1	India	1	1

N = 174

Correspondingly, although many languages are spoken by notaries public, only 73 notaries (recorded) speak one or more languages other than English. Italian is the predominant language spoken (32 persons speak Italian), followed by German (22 persons) and French (12 persons); 28 persons speak a Slavic language. No other language or language group is spoken by a large group of notaries public.

TABLE IV: Types of Languages (other than English)
Spoken by Notaries Public

	No.		No.
French	12	Turkish	1
German	22	Russian	5
Italian	32	Hungarian	9
Spanish	3	Polish	5
Swedish	1	Latvian	2
Finnish	1	Ukrainian	2
Dutch	1	Serbo-Croatian	4
Greek	2	Czech	4
Portuguese	4	Estonian	1
Maltese	2		

N = 73 Notaries

A majority of persons (62%) appearing in Table IV speak only one language. Fewer speak two languages (17%), and even fewer speak from three to seven languages. Most (50%) of those persons (8) who speak more than three languages, speak a language of Slavic derivation.³⁵

TABLE V: Number of Languages (other than English)
Spoken by Notaries Public

	No.	%
One language	44	62
Two languages	12	17
Three languages	7	10
Four languages	2	3
Five languages	4	5
Seven languages	2	3

Only 59 files had information about educational backgrounds. Of those files, 24 persons (41%) completed law school overseas, or in another province, and 12 persons (20%) completed university. While there is a large number of legally trained notaries (43%), those notaries do not appear in a single occupational group. By occupation, the largest group of legally trained notaries appears in the government/corporate category (10 persons, 41.7% of those legally educated). Often, persons in the government/corporate field who have law degrees, have graduated from a Canadian law school, and have expertise in Canadian law, although they do not practise in Ontario.

TABLE VI: Educational Level

	No.	%
Completed high school	7	12
Trade school	4	7
Attended university	6	10
Completed university	12	20
High school and Law school	1	2
Attended law school	1	2
Completed law school	24	41
Translating degree	1	2
Accounting course	2	3
Business Administration	1	2

N = 57

The second largest occupational group of persons legally trained is that of travel agents (6 persons, 25% of legally educated), and the third largest group is that of real estate brokers and insurance agents (3 persons, 12.5%). However, it must be stressed that a cross-

tabulation of these different factors could draw only from 59 complete files. Numbers of persons with law degrees may be disproportionate with respect to the occupational group at-large. For example, the largest group of notaries with law degrees (government/corporations) represents only 11.5% of the actual occupational group. As the files were often incomplete, the number of persons with law degrees in corporate or government work may be over-or under-representative. These particular figures should therefore be treated with some caution.

Of the group that listed their educational qualifications, 55 persons indicated where they obtained their highest degree. Most persons (47%) obtained their education in Canada or Ontario. The second largest group (18%) completed their degrees in Italy. The third largest group ("other", 15%) obtained their education in Eastern European countries.

TABLE VII: Location of Last highest Educational Qualification

	No.	%
Ontario	1	2
Canada	25	45
U.S.	1	2
U.K.	4	7
Italy	10	18
Hungary	5	9
Poland	1	2
Other	8	15

N = 15

A majority (44%) of the notaries work either for the government or a corporation. The rationale behind placing "government" and "corporation" in the same occupational category, lay in the fact that in both cases notarial services are restricted very much to in-house purposes (such as import-export documents) and are not generally offered to the outside public. The second largest category (27%) is that of travel agents, persons who work only as notaries public, and translators. Only four notaries are law clerks or legal secretaries as well. This reflects the current ministerial policy not to make new appointments of law clerks or legal secretaries as notaries public.⁸⁶

TABLE VIII: Occupation

	No.	%
Travel agent/Translator/Notary public	53	27
Insurance agent/Real estate broker	21	11
Patent agent/Patent attorney	10	5
Associations: practical (e.g. Ontario Motor League) /Charity/Ethnic	6	3
Company/Government	86	44
Law clerk/Legal secretary	4	2
Sheriff	5	3
Other	12	6

N = 197

Many notaries have been appointed in the past few years (39%, in the past 1-5 years). As the recent government policy has been to appoint few non-lawyer notaries in small businesses,⁸⁷ it seems likely that most new appointees are either in corporate or government work. Few appointees were granted their commissions prior to the 1962 Act.

TABLE IX: Number of Years as a Notary Public

	No.	%
0 - 5	73	39
5 - 10	40	21
10 - 15	23	12
15 - 20	45	24
20 - 25	6	3
25+	2	1

N = 189

Most notaries live and work in the Toronto (central 42%) North York (11%), or Ottawa-Carleton (10%) area. This is to be expected, for as one of the appointment criteria is "need",⁸⁸ "need" would call for the appointment of more notaries in larger population centres.

In Toronto, 28 persons (34%) are travel agents, translators, or notaries public; and 26 persons (31.7%) are government or corporate employees. A preponderance of persons in the Ottawa-Carleton regional municipality work either for the government or a corporation. A majority of the notaries in North York (52.4%) work for a corporation or government agency as well. It is possible to distinguish between government and corporate employees by the kinds of documents notarized in the three metropolitan areas:

TABLE X: Location of Office by Kinds of Documents

	Foreign documents	Legal documents	Company documents	Affadavits & documents
Ottawa-Carleton	0	2	3	0
North York	7	0	12	0
Toronto	33	11	23	6

	Government documents	Commercial documents	Other
Ottawa-Carleton	13	0	0
North York	0	0	2
Toronto	1	3	5

In Ottawa-Carleton 13 persons (72.2%) notarize government documents.

In contrast, North York notaries generally (57.1%) notarize company documents. Toronto notaries divide evenly between persons who notarize foreign documents (40.2%), and persons who notarize company documents (23 persons or 28%). Thus, the Ottawa-Carleton area has the greatest concentration of government notaries.

Company and foreign documents are the two kinds of documents most frequently notarized.

TABLE XI: Kinds of Documents

	No.	%
Travel documents: "foreign documents", (estates, etc.) translations	63	32
Legal documents: e.g. patent applications, other legal documents	19	10
Legal documents for company: e.g. export/import	67	34
Legal documents plus large amounts of sworn affidavits/declarations	18	9
Legal documents for government	17	9
Commercial documents	3	2
Other	8	4

N = 195

Little dramatic difference exists between categories for number of times per month documents are filed in Ontario:

TABLE XII: Frequency of Use for Documents Filed in Ontario

No. Times/Month	No.	%
0 -	12	8
1 - 5	30	19
5 - 10	24	15
10 - 15	26	17
15 - 20	6	4
20 - 45	27	17
45 - 70	12	8
70 - 100	5	3
100 +	15	10

N = 157

Most notaries file 1 - 5 documents per month outside of Ontario

TABLE XIII: Frequency of Use for Documents Filed Outside of Ontario

No. Times/Month	No.	%
0	21	13
1 - 5	46	29
5 - 10	19	12
10 - 15	20	13
15 - 20	10	6
20 - 45	21	12
45 - 70	6	4
70 - 100	5	3
100 +	10	6

N = 158

By occupation, most travel agent notaries file documents in Ontario 20-45 times per month, and outside Ontario 0-5 times per month.

Corporate and government notaries are equally spread across all numbers of documents filed in Ontario. For documents filed outside of Ontario, corporate notaries either seem to sign few (1-5, 40%) or many (20-70, 40%), and government notaries mostly sign between 1-5 (27.4%), or 5-15 documents (5-10: 13.7%; 10-15: 12.3%) per month.

In almost all cases, there are no other notaries in the firm besides the applicant.

TABLE XIV: Number of notaries in firm (other than applicant)

No. Times/Month	No.	%
0	156	81
1	31	16
2	5	3
4	1	1

N = 193

Firms with no other notaries generally file between 1-15 documents per month in Ontario.⁸⁹ The majority (27.6%) of firms with no other notaries file between 1-5 documents per month out of Ontario. Those firms with 1 other notary usually (27.5%) file between 1-10 documents per month in Ontario, and 1-5 (34.5%) or 20-45 documents (20.7%) per month out of Ontario.⁹⁰

Very few (2%) of the notaries hold an unrestricted notarial commission. Most (91%) have full limitations of territory and case* placed on their notarial commission. Some notaries (14%) are limited

* See page 6, above.

only to the province, and not to a particular employer.

TABLE XV: Restrictions on Notarial Commission

	No.	%
Full limitations	189	91
Limit to province and employer	1	1
Limit to province only	14	7
No restrictions	3	2

N = 197

Two out of three notaries with an unrestricted notarial commission had been in practice for 10 years or longer.⁹¹ As well, two of the notaries with unrestricted commissions work in a travel agency, or as real estate agents.⁹² No complaints have been lodged against any of the three unrestricted notaries public examined.

Notaries public come from varied backgrounds and educational levels. No single demographic group merits special examination. However, it may be noted that there is a clear division between notaries public who interact with the public frequently (such as travel agents) and notaries public who do not (such as government or corporate officials). The risk of unauthorized practice or other misbehavior appears primarily in the former group.

B. Complaints

The sample examined showed little evidence of abuse of the notarial commission. Complaints were made in only 11 out of 197 cases. Because of the fact that all complaints are recorded in the notary's file no matter what year they occurred, 11 does not represent the number of complaints made from July 1, 1977 to July 15, 1978.⁹³

TABLE XVI: Complaints

	No.	%
Yes	11	6
No	186	94

N = 197

Of those complaints, 8 persons were complained about only once, 1 person twice, and 2 persons 3 times:

TABLE XVII: Number of Complaints

	No.	%
0	186	94
1	8	4
2	1	1
3	2	1

N = 197

It appears that few notaries act inappropriately, or at any rate that few cases of misbehavior are reported.

Most complaints were about the unauthorized practice of law by a lay notary:

TABLE XVIII: Type of Complaint

	No.	%
Unauthorized practice	6	55
Fraud	1	9
Acted outside of restrictions	1	9
Violated requirements for a guarantor section for immigration purposes	1	9
Other	2	18

N = 11

All subjects of complaints were born outside of Canada.⁹⁴

Nearly all complaints were made against persons who had been notaries for a number of years.

TABLE XIX: Years as a Notary by Complaints

	Yes	No
0 - 5	1	72
5 - 10	1	39
10 - 15	4	19
15 - 20	4	41
20 - 25	0	6
25 +	1	1
		N = 189

It is of interest to note that the majority of offenders are well-educated. Five persons who received complaints graduated from law school. Three of the complaints received about the 5 persons with law degrees had to do with the unauthorized practice of law:

TABLE XX: Education by Complaint Type

	Unauthorized Practice	Acted Outside of Restrictions	Violated Guarantor Section For Immigration	Other
Completed High Sch.	0	0	1	0
Trade Sch.	1	0	0	0
Completed University	1	0	0	0
Attended Law Sch.	0	0	0	1
Completed Law Sch.	3	1	0	1

N = 9

All persons complained about are in occupations which have constant contact with the public. Most recipients of complaints are travel agents, translators or persons who work only as notaries public.

TABLE XXI: Occupation by Complaint Type

	Unauthorized Practice	Fraud	Acted Outside of Restrictions	Violated Guarantor Section For Immigration	Other
Travel Agent					
Notary Public					
Translator	5	1	1	1	1
Real Estate Broker	0	0	0	0	1
Charitable Association	1	0	0	0	0

N = 11

The only persons who continued to abuse their commissions after discipline were travel agents.⁹⁵

Nine out of the eleven notaries disciplined had full limitations on their notarial commission. No notaries with unrestricted commissions did anything reprehensible.

Despite the fact that notaries are a heterogeneous group, recipients of complaints appear frequently to come from the same occupation and age group.

Two factors may contribute to this phenomenon: first, that the disciplined notaries are in occupations that have constant contact with the public thereby creating more opportunity to advise on legal matters. Second, new Canadians may misapprehend the true legal authority of the visible notary public, and may demand services the notary finds easier to give (particularly the legally trained notary) than to refuse.

PART V: Conclusion

Few major problems in appointment and regulation of lay notaries public have arisen since the enactment of the 1962 legislation. Yet uncertainties in the statute and Ministry policy may cause future problems. There are no determinate criteria for appointment of lay notaries public. The powers of a notarial commission are poorly defined in the case of a lay notary public. Ambiguous limitations on the restricted notarial commission make effective discipline more difficult.

There is some question whether preventive steps could be taken which would make discipline unnecessary in a number of cases. The following comments investigate the major problem areas relating to lay notaries public.

Self-regulation

Should notaries be self-regulated? As noted previously, British Columbia is the only province which has adopted a scheme for self-regulation of notaries public.⁹⁶ While an argument could be made for a society of notaries on the grounds that a society could discipline more effectively, maintain continuing education, and promote a "professional" attitude, there is some question whether those grounds are a sufficient mandate for self-regulation. It is dubious that sophisticated professional criteria are necessary for the efficient supply of simple services. More likely an answer to problems with regulation of lay notaries in Ontario may be found by strengthening existing legislation rather than establishing a society of notaries public.

Admission

At present notaries are appointed in Ontario by a provincial examiner or county court judge. The requisite character traits and "need" for a notary public in the particular area are assessed according

to the discretion of the examiner. This raises both questions of unfairness and inappropriateness: unfairness, because an applicant may be refused a commission for vague and perhaps incorrect reasons because of the "discretionary" appointment process; inappropriateness, because it is questionable whether "need" should (or can) be assessed by the examiner.

It is doubtful whether the requirement that the examiner determine "that a notary public is needed for public convenience in the place where the applicant ... intends to carry on business",⁹⁷ is necessary or even correct. Certainly "need" could be more effectively determined by market conditions, than by an examiner. It is submitted that an assessment of "need" as a prerequisite for obtaining the notarial commission is unnecessary.

The discretionary assessment of the applicants' qualifications and character is also questionable. The California system of written examinations might well merit application in Ontario. As in California, a handbook could be distributed to interested parties listing requirements (such as knowledge of pertinent provincial laws) for obtaining a commission. The applicant would then be required to pass a written examination on those requirements. If desired, an element of discretion in appointment of the part of the examiner could be maintained by instituting (as in California) a requirement of "good moral character" which could be assessed at a later interview.

The current policy of the Ministry is not to grant new commissions to law clerks. This is grounded on the premise that the client will not be able to differentiate between a lawyer and a law clerk with a notarial commission. This supposition is questionable, for law clerks perform many other duties commonly thought of as "legal"

without perpetrating confusion. No complaints were made⁹⁸ about law clerks appointed as notaries public under the old policy. Appointment of law clerks as notaries public would provide more efficient notarial and legal services, and thus merits examination.

Function

The part of the Ontario statute which defines powers granted to notaries public clearly needs revision. The language of the section⁹⁹ appears to grant more extensive powers than "the attestation of instruments and taking of affidavits".¹⁰⁰

As well, restrictions on the use of a notarial commission are not clear. There is confusion as to the meaning of the limitation of "territory and case".¹⁰¹ With respect to "case", there is some question whether the "attestation of instruments" may include drawing up certain documents. The limitation of "territory" is also vague. The lay notary is usually limited to work in a particular province or jurisdiction while "in the employ of _____". Yet, the definition of "while in the employ of _____" is uncertain. In the case of the travel agent, is it proper for the travel agent to provide notarial services to any person regardless of whether that person wishes to make travel arrangements?

Discipline

Perhaps further stress should be placed on the preventive rather than the punitive aspects of discipline. A common requirement in the United States is the posting of a bond for a certain amount of money¹⁰² as a surety to go to the complainant who suffers loss from a notary's misfeasance. The posting of a bond might serve to deter improper conduct. Another alternative, as in British Columbia, would be to establish a compensation fund for injured complainants out of payments received from

all newly appointed notaries. This alternative would not really serve to deter, but rather to compensate. It is preferable, however, to stop improper behavior before any question of harm to complainants arises. Correspondingly, the mandate for acquainting the public with the limitations of the notarial commission becomes even stronger. For new Canadians from Europe, the name "notary public" is misleading, for it connotes to a European a much higher level of legal expertise than actually possessed by Canadian lay notaries public. Perhaps the lay notary should be given a title with fewer legal connotations than that of "notary public". Or, the title of "notary public" could be maintained with certain safeguards. As in California, the notary public could be required to place a placard prominently in his shop stating that "a notary public is not a lawyer" in different languages. The notarial seal could be engraved with limitations as well. Various practical methods could be used to inform the public that the lay notary public is not qualified to offer legal opinions.

A clarification of the preceding problem areas through introduction of new legislation or re-evaluation of Ministry policy is in order.

APPENDIX I

1. Age

<u>20-25</u>	<u>40-45</u>
<u>25-30</u>	<u>45-50</u>
<u>30-35</u>	<u>50-55</u>
<u>35-40</u>	<u>55-60</u>
	60+

2. Sex	M	F
--------	---	---

3. Place of birth

_____ Ontario
_____ Canada
_____ U.S.
_____ U.K.
_____ Other

4. Languages Spoken

_____ French
_____ German
_____ Italian
_____ Spanish
_____ Portuguese
_____ Hungarian
_____ Chinese
_____ Korean
_____ Russian
_____ Other

5. Education

_____ attended high school
_____ completed high school
_____ community college
_____ trade school
_____ attended university
_____ completed university
_____ high school & law school
_____ university & law school
_____ attended law school
_____ completed law school
_____ other legal studies
_____ other

6. Location of LHEQ

_____ Ontario
_____ Canada
_____ U.S.
_____ U.K.
_____ Other

7. Location of office

8. Occupation

.....

1. _____

2.

3. _____

4.

5.

6.

7.

8.

9. Number of years as notary

<input type="checkbox"/> 0-5	<input type="checkbox"/> 15-20
<input type="checkbox"/> 5-10	<input type="checkbox"/> 20-25
<input type="checkbox"/> 10-15	<input type="checkbox"/> 25+

9. _____

10. Kinds of documents notarized

10. _____

11. Type of client

11. _____

12. Frequency of use for document
filed in Ontario

<input type="checkbox"/> 1-5 times per month
<input type="checkbox"/> 5-10 times per month
<input type="checkbox"/> 10-15 times per month
<input type="checkbox"/> 15-20 times per month
<input type="checkbox"/> 20+ times per month

12. _____

13. Frequency of use for documents
filed outside of Ontario

<input type="checkbox"/> 1-5 times per month
<input type="checkbox"/> 5-10 times per month
<input type="checkbox"/> 10-15 times per month
<input type="checkbox"/> 15-20 times per month
<input type="checkbox"/> 20+ times per month

13. _____

14. Number of notaries in firm

14. _____

15. Complaints

☐ yes ☐ no

15. _____

16. Checklist

☐ unauthorized practice

☐ Other

16. _____

FOOTNOTES

1. All historical references from: Brookes Treatise on A Notary of England, 9th ed. Charlesworth, L.L.D., (London), Stevens and Sons, Ltd. 1939 "Halsbury's Laws of England", 2nd ed. Lord Hailsham, 1931.
2. The system was called notae and consisted of arbitrary marks instead of the abbreviations (siglia) previously used.
3. see: Rot. Chart, 1 John
Canons of the General Council of London, Otho legate of Gregory IX, temp. Henry III, 1237.
4. Pollack & Maitland, History of English Law (2nd ed.) vol. i, p. 218.
5. The Public Notaries Act 1801, 41 Geo. 3. c. 79.
6. 33 VICT., c. 6.
7. R.S.O. 1877, c. 141; R.S.O. 1887, c. 153; R.S.O. 1897, c. 175; 9 Edward VII, 1909, c. 63.
8. S.O. 1962-3, c. 91.
9. S.O. 1964, c. 72; S.O. 1970, c. 22; R.S.O. 1970, c. 300.
10. 33 VICT., c. 6, s. 2.
11. R.S.O. c. 1877, c. 141, s. 3(2).
12. An Act Respecting Notaries Public, R.S.O. 1887, c. 153, ss. 4-6.
13. R.S.O. 1887, c. 153, s. 4.
14. R.S.O. 1887, c. 153, s. 6.
15. R.S.O. 1887, c. 153, s. 5.
16. Ellen B. Murray, "Citizenship and Professional Practice in Ontario" Working Paper #3, prepared for the Professional Organizations Committee (1978) p.24.
17. 9 Edward VII, 1909 (Ontario).
18. p. 1282, Ontario Legislature, Speeches, 1962-3.
19. p. 1286, Ontario Legislature, Speeches, 1962-3.
20. Interview with Ron Schurman, former Provincial Examiner, June 26, 1978.
21. The Notaries Act 1962, S.O. 1962, c. 91, s. 1.
22. The Notaries Act 1962, S.O. 1962, c. 91, s. 2.

23. The Notaries Act 1962, S.O. 1962, c. 91, 2. 6.
24. The Notaries Act 1962, S.O. 1962, c. 91, 2. 6.
25. In Mitchell, notaries have "... no power whatsoever to raise and settle with a solicitor questions of title or to express opinions to clients that they had a 'good and marketable title'.
26. The Notaries Act 1962, S.O. 1962, c. 91, s. 7(2).
27. Commissioners for Taking Affidavits Act, R.S.O. 1970, c. 72, s. 5(3).
28. Commissioners for Taking Affidavits Act, R.S.O. 1970, c. 72, s. 9.
29. Commissioners for Taking Affidavits Act, R.S.O. 1970, c. 72, s. 2.
30. Interview with Mr. Ron Schurman, Provincial Examiner 1973-77, June 26, 1978.
31. It is estimated that there are close to 20,000 commissioners in Ontario. In 1977, 1,517 commissioners were appointed in York, and 2,249 appointed elsewhere in Ontario. Telephone conversation with Mrs. Tess Caldwell, Ministry of the Attorney General, August 17, 1978.
32. Notarial Act, Que. S. 1968, c. 70.
33. re "numbers" section of Chart "A".
34. Letter from the New Brunswick Deputy Minister of Justice, August 16, 1978.
35. See Chart "A".
36. Alberta: c. 261, s. 2; Saskatchewan: c. 84, s. 2.
37. Manitoba: E. 150, s. 76; New Brunswick: N-9, s. 3.1; Nova Scotia: c. 208, s. 42.
38. Newfoundland: c. 275, s. 2; Ontario: c. 300, s. 1.
39. Alberta, New Brunswick, Newfoundland, Nova Scotia, Saskatchewan, Ontario.
40. Prince Edward Island, Manitoba.
41. Alberta, New Brunswick, Ontario.
42. British Columbia, Ontario, Newfoundland.
43. Newfoundland, c. 275, s. 5.
44. Ontario, c. 300, s. 7(2).
45. British Columbia, c. 266, s. 28.

46. British Columbia, Alberta, Manitoba, Saskatchewan, Ontario.
47. British Columbia, c. 266, s. 15.
48. Ontario: c. 300, s. 4; Manitoba: E. 150, s. 90.
49. Alberta: c. 261, s. 4(2); British Columbia: c. 266, s. 7.
50. British Columbia: c. 266, s. 2.
51. British Columbia: c. 266, s. 22.
52. British Columbia: c. 266, s. 6.
53. In Re Butler 107 N.W. 572.
54. In Re Butler 107 N.W. 572.
55. Taggart v. Mandel, 391 F. Supp. 732 (1975), U.S. District Court.
Cheng v. State of Illinois, 438 F. Supp. 917 (1977), U.S. District Court.
56. Delaware, Wisconsin, California.
57. ten: see Chart "B".
58. five: see Chart "B".
59. Harding v. Pinchot et al., 159 A. 16 (1932, Penn S.C.).
60. R.S. Art 5949, s. 1(2)
61. See Chart "B".
62. Stork v. the American Surety Co., 33 So. 742, 109 C.A. 713.
63. 66 Corpus Juris Secundum, cit. 611.
64. Missouri: V.A.M.S. 486.2001, s. 385.
65. 66 Corpus Juris Secundum 604.
66. That is, unique among the states surveyed.
67. California R.S. State Government 8201(c), new 1977.
68. California R.S. State Government, 8201(c).
69. California R.S. State Government, 8201.1.
70. California R.S. State Government, 8214.1.
71. App. 120 Cal. Rptr. 207 (2nd. District, Allport, R.I.).

72. App. 120 Cal. Rptr. 107, at 209.
73. California R.S., State Government, 8119.5.
74. California R.S., State Government, 8223.
75. 41 Geo. 3 c. 79, s. 13.
76. Ibid.
77. 6 & 7 Vict., c. 90 s. 4.
78. 6 & 7 Vict., c. 90.
79. Hals 3d, 1120. Such as the taking of affidavits, and attesting to commercial documents.
80. Re Champion 1906, p. 86; Wales 1908 W.N. 193.
81. 6 & 7 Vict. c. 90, s. 3.
82. The notaries come from different backgrounds: Corporate travel agents, etc..
83. From 1 July 1977-15 July 1978. Time constraints precluded further research. There are approximately 560 non-lawyer notaries in Ontario.
84. See Appendix I.
85. Statistics 8/21/78, page 15.
86. Meeting with Peter Clendenning, Provincial Examiner, 21 June 1978.
87. Ibid.
88. The Notaries Act. R.S.O. 1970, c. 300, section 2.
89. Statistics 8/21/78 p. 71.
90. Statistics 8/21/78 p. 56.
91. Statistics 8/21/78 p. 77.
92. Statistics 8/21/78 p. 71.
93. In fact, none of the notaries due for renewal in 1978 were complained about during the period studied. Mr. Clendenning (interview, 21 June 1978) stated that he had only one case of improper conduct since starting as a provincial examiner. More complaints (10-12 per year) were received in the 1960's.
94. Statistics 8/22/78, p. 14.

95. Statistics 8/22/78, p. 20.
96. The society is not completely self-regulatory, for while the society disciplines, notaries are still appointed by the courts.
97. The Notaries Act, R.S.O. 1970, c. 300, s. 3.
98. In the notaries' files which were examined.
99. "Subject to ... (restriction of territory and case)... a notary public has and may use and exercise the power of drawing, passing, keeping and issuing all deeds and contracts, charterparties, and other mercantile transactions in Ontario, and also of attesting all commercial instruments that may be brought before him for public protestation..." The Notaries Act, R.S.O. 1970, c. 300, s.3.
100. The common limitation of "case".
101. The Notaries Act, R.S.O. 1970, c. 300, s. 2(2)
102. Re: Chart "B" The amount of the bond is usually between \$1000-\$5000.

